Supreme Court, U.S.
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No. 00-853 (7)

IN THE

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,
Petitioners,

v.

RONALD NUSSLE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether inmate excessive force claims are subject to the administrative exhaustion requirement of § 803(d) of the Prison Litigation Reform Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The administration of a state or local correctional institution is invariably a complex and difficult undertaking fraught with tension and countless occasions for friction and disagreement. As Justice Stewart wrote for the Court in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." Moreover, "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen." *Id.* at 492. As a result, "the possibilities for litigation . . . are boundless." *Id.*

Recognizing this fact, and attempting to introduce a measure of reason in response to the exponential increase in inmate litigation of recent decades, Congress enacted the Prison Litigation Reform Act of 1995. One provision of the PLRA requires inmates to exhaust state administrative remedies prior to initiating lawsuits over "prison conditions." 42 U.S.C. § 1997e(a). Contrary to the holding of every other court of appeals that has considered the issue, the court below ruled that an inmate's claim that a correction officer has used excessive force is not subject to the PLRA's exhaustion requirement because excessive force claims do not involve

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

"the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

Amici respectfully submit that the ruling of the court of appeals is not only patently erroneous, but defeats the important public policies of the Prison Litigation Reform Act. The PLRA exhaustion requirement aids not only the courts and governmental defendants, but often inmates as well. As the leading inmate litigation handbook has noted, inmates will frequently be better off if they exhaust expeditious administrative remedies prior to—and possibly in place of—initiating time-consuming and protracted litigation. *See* John Boston & Daniel Manville, *Prisoners' Self-Help Litigation Manual* 451 (3d ed. 1995) (detailing benefits to inmates from use of administrative remedies to resolve grievances).

Because of the importance of the question presented to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

A. In 1964, this Court first sanctioned the right of prisoners to bring suit under 42 U.S.C. § 1983 to challenge a State's alleged unconstitutional treatment while in confinement. Prison life has unique potential to foster litigation. Consequently, the number of prisoner civil rights lawsuits in federal courts thereafter burgeoned from 218 in 1966 to 41,312 in 1995.

Section 1983 plaintiffs are ordinarily not required to exhaust administrative remedies. As a result, an immense volume of inmate civil complaints flooded the federal courts. Not only did a very small percentage of these prisoner suits prove to be meritorious, but, even more important, inmates frequently represented themselves and thus were often ill-equipped to present legal arguments, proffer evidence, or conduct settlement negotiations with defense counsel.

Congress's response was to enact a series of statutes designed to encourage inmate litigants to pursue their grievances in less formal, more expeditious administrative proceedings prior to filing civil actions in federal court. These efforts began in 1980 with Section 7 of the Civil Rights of Institutionalized Persons Act (CRIPA) and culminated in the Prison Litigation Reform Act of 1995 (PLRA). Whereas Section 7 of CRIPA *encouraged* the use of administrative remedies with scant success, Section 803(d) of the PLRA *requires* the exhaustion of available administrative remedies before an inmate can file a civil action "with respect to prison conditions." 42 U.S.C. § 1997e(a).

B. With the exception of the court below, every federal court of appeals to have considered the question has held that claims of excessive force are subject to the PLRA's exhaustion requirement. These courts have relied on two principal legal theories to support that conclusion.

First, while section 803(d) does not define the class of "action[s] . . . with respect to prison conditions" that are subject to the PLRA's exhaustion requirement, the pivotal language is defined on the preceding page of the Statutes at Large. *See* PLRA § 802(g)(2), 110 Stat. 1321-70 (codified at 18 U.S.C. § 3626(g)(2)). That section states that "the term 'civil action with respect to prison conditions' means any civil proceeding. . . with respect to the conditions of confinement or *the effects of actions by government officials on the lives of persons confined in prisons. . . .*" *Id.* (emphasis added).

For reasons best known to itself, the court below found the language of section 802(g)(2) to be inapplicable to Nussle's claim that the petitioner correction officers used excessive force against him. Although the court concluded that the language of section 802(g)(2) cannot, as a matter of the niceties of English prose style, be applied to Nussle's excessive force claim, other courts have readily rejected such reasoning. As the Third Circuit held, for example, the

language of section 802(g)(2) plainly "refer[s] to civil actions ranging from excessive force. . . to actions 'with respect to'" a wide variety of other allegedly objectionable prison conditions, all of which have this in common: "They make [inmates'] lives worse." *Booth v. Churner*, 206 F.3d 289, 295 (3d Cir. 2000), *aff'd on other grounds*, 121 S.Ct. 1819 (2001).

In addition, the court of appeals' statutory analysis would have perverse results. It would require litigation over whether a case can proceed when a prisoner simultaneously sues corrections officers and higher-level prison officials. *See Procunier v. Navarette*, 434 U.S. 555, 556 (1978) (inmate suit against correctional counselors also named as defendants director of state department of corrections, warden, and assistant warden). It would likewise necessitate litigation where, as here, an inmate files a complaint that challenges both ongoing conditions and an incident of excessive force. *See* Pet. App. 24a (opinion of district court) (Nussle "alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation") (citing Compl. ¶¶ 7, 9).

Second, the judgment below is irreconcilable with this Court's analysis and holding in *McCarthy v. Bronson*, 500 U.S. 136 (1991). In *McCarthy* the Court unanimously ruled that the term "conditions of confinement" in 28 U.S.C. § 636(b)(1)(B), the statute governing the jurisdiction of U.S. magistrates, encompasses excessive force claims. Indeed, in *McCarthy* the Court rejected the very argument accepted by the court below—that "Congress used the term 'conditions of confinement'" to refer only to "ongoing situations." *See* 500 U.S. at 142.

The statutory analysis of *McCarthy* should control the outcome in this case, as other courts of appeals have held. Congress enacted the PLRA exhaustion requirement only five years after the *McCarthy* Court unanimously construed the "conditions of confinement" language of § 636(b) to encompass cases "challenging specific acts of alleged

misconduct" such as the use of excessive force at issue in that case. *See* 500 U.S. at 143. Congress had no reason to expect courts to construe the similar term "prison conditions" in the PLRA any differently. The judgment below should accordingly be reversed.

ARGUMENT

THE ADMINISTRATIVE EXHAUSTION REQUIREMENT OF THE PLRA APPLIES TO ALL PRISONER SECTION 1983 CLAIMS, INCLUDING EXCESSIVE FORCE CLAIMS

A. The High Volume Of Inmate Litigation Necessitated The Broad Exhaustion Requirement Of The PLRA

In *Cooper v. Pate*, 378 U.S. 546 (1964), this Court first sanctioned the right of prisoners to bring suit under 42 U.S.C. § 1983 to challenge a State's "alleged unconstitutional treatment . . . while in confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). An exponential increase in the volume of inmate litigation occurred in the ensuing decades, leading to the adoption of the Prison Litigation Reform Act in 1996. *See generally Booth v. Churner*, 206 F.3d 289, 298 n. 9 (3d Cir. 2000) (discussing legislative history of PLRA), *aff'd*, 121 S.Ct. 1819 (2001).

"Prison life creates the potential for an enormous number of cases under section 1983." William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits In The Federal Courts*, 92 Harv. L. Rev. 610 (1979). Ten years after *Cooper*, the Court itself acknowledged the unique potential of the prison environment to foster litigation.

> The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the

> State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

Preiser, 411 U.S. at 492. Indeed, "[e]very such dispute can become a Section 1983 case." Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 611. *See also Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) ("With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population.").

The Court had previously held that Section 1983 plaintiffs are not required to exhaust state administrative remedies. *See McNeese v. Board of Ed.*, 373 U.S. 668, 674-76 (1963); *see also Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Preiser* thus recognized that "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." 411 U.S. at 494.

The *Preiser* Court nonetheless suggested that the unique nature of prison litigation warranted an exception to the general rule of non-exhaustion under Section 1983. As the Court explained,

> Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with

> the grievances of state prisoners and in a better physical and practical position to deal with those grievances.

411 U.S. at 492.

In 1980, Congress took a first step toward requiring inmates to exhaust administrative remedies by enacting Section 7 of the Civil Rights of Institutionalized Persons Act (CRIPA), Pub. L. No. 96-247, 94 Stat. 352 (1980) (formerly codified at 42 U.S.C. § 1997e). For various reasons, Section 7 failed significantly to diminish the rising volume of inmate litigation.[2] Indeed, from the year ending June 30, 1966, through the year ending June 30, 1995, the number of prisoner civil rights suits in federal court grew from 218 to 41,312.[3] In the year ending September 30, 1995, prisoner

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[2] Under former section 1997e, exhaustion of state administrative remedies was not required "unless the Attorney General ha[d] certified or the court ha[d] determined that [the remedy was] in substantial compliance with the minimal acceptable standards" of § 1997e(b). 42 U.S.C. § 1997e(a)(2) (1994). Those standards included Justice Department regulations that "provide[d] '. . . for an advisory role for . . . inmates of any jail, prison, or other correctional institution . . . in the formulation, implementation, and operation of the system." *Id.* § 1997(b)(2)(A). The version of the regulations in place in 1987 provided that " '[a]t a minimum, some employees and inmates shall be permitted to participate in an advisory capacity in the disposition of grievances challenging general policy and practices and to review the effectiveness and credibility of the grievance procedure.' " *Lewis v. Meyer*, 815 F.2d 43, 46 (7th Cir. 1987) (quoting 28 C.F.R. § 40.7(b) (1986)). The Attorney General's final set of regulations likewise required that "[t]he institution shall provide for an advisory role for . . . inmates in the operation of the grievance system." 28 C.F.R. § 40.7(b) (2000). As a result, "extremely few jurisdictions . . . attempted to win approval of their administrative remedies" under this version of § 1997e. Charles F. Abernathy, *Civil Rights and Constitutional Litigation: Cases and Materials* 235 (2d ed. 1992).

[3] *Compare* Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 611 (giving 1966 data and citing Administrative Office of the U.S. Courts, *1975 Annual Report of the Director* 207 (1975) (table 24)), *with* Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and The*

section 1983 cases comprised 16.8 percent of the civil docket of federal district courts nationwide. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1998* (Table C-2A) (available at http://www.uscourts.gov/dirrpt98/c2asep98.pdf).

This growth in prisoner section 1983 litigation "place[d] great stress on the resources of the federal courts," and in particular, "the district courts [which] face numerous practical difficulties in dealing with unrepresented litigants." Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 63 (1995). The litigation burden on both the courts and governmental defendants is frequently exacerbated by the fact that "[a] significant number of these plaintiffs proceed pro se." *Id.* According to the Judicial Conference, "[m]any [prisoner plaintiffs] are illiterate, most are unschooled in the law, and some are in need of mental health counseling." *Long Range Plan* at 64. For these reasons, "[r]elatively few . . . cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible." Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 637.

At the same time, some inmate litigants "are 'frequent filers,' having upwards of 20 cases in court at one time," and "some of these latter plaintiffs are very sophisticated and adept at pleading practices, forcing the court to continue cases even on claims without any basis in fact or law." Judicial Conference, *Long Range Plan*, at 64-65.[4] Indeed, as the Fifth

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Federal System 1122 (4th ed. 1996) (citing letter from the Administrative Office of the United States Courts to David Shapiro, Aug. 31, 1995). *See also Booth v. Churner*, 206 F.3d at 298 n.9 (discussing "the crushing burden these suits have on federal courts" and giving statistics on growth of inmate litigation).

[4] *See also* Turner, *When Prisoners Sue*, 92 Harv. L. Rev. at 635 ("Every jurisdiction seems to have one or more notorious jailhouse lawyers, who can account for as many as twenty or thirty cases filed in

Circuit observed prior to the enactment of the PLRA, "pro se civil rights litigation ha[d] become a recreational activity for state prisoners." *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988). *See also* Judicial Conference, *Long Range Plan* at 65 (some "cases are brought merely to enable a plaintiff to confer with another inmate, or to travel outside the prison for a court hearing").

An additional problem was that "the obvious purpose of some filings is to harass prison or court authorities." *Id. See also Cleavinger*, 474 U.S. at 211 (Rehnquist, J., dissenting) (prison disciplinary officials "are much more likely to be the object of harassing litigation in the absence of absolute immunity"). The Eighth Circuit likewise noted that prisoner section 1983 suits "are frequently without merit and may be maliciously motivated. An inmate may use a suit or a threat of a suit as a lever to obtain favorable treatment or a desirable work assignment." *Wycoff v. Brewer*, 572 F.2d 1260, 1266 (8th Cir. 1978).

The cumulative effect of the foregoing was, as Justice Powell put it, that "federal courts [were] often . . . converted into small-claims tribunals." *Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring); *see also Preiser*, 411 U.S. at 492. The result in many cases was to "trivialize[]" constitutional law and the role of the federal courts. *Parratt*, 451 U.S. 554 n.13 (Powell, J., concurring). Moreover, the costs and benefits of prisoner section 1983

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their own names. No one can be sure how many additional cases they may have drafted, advised, or inspired.") (footnote omitted); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 Rutgers L.J. 361, 367-68 (1998) (discussing "frequent filers," including one Missouri inmate who filed over 700 lawsuits).

litigation suggest that civil actions were almost invariably an extremely inefficient way to resolve inmate grievances.[5]

Congress ultimately responded by enacting the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321-66 (1996). Among PLRA's various provisions is Section 803(d), which amended 42 U.S.C. 1997e to read as follows:

> (a) Applicability of Administrative Remedies.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

110 Stat. 1321-71 (codified at 42 U.S.C. § 1997e(a)).

Section 803(d) amended section 1997e(a) in several significant ways. First, it makes exhaustion mandatory rather than discretionary with the court. *See Booth v. Churner*, 121 S.Ct. 1819, 1825 n.5 (2001). Second, it eliminates the requirement that the Attorney General certify or a court determine that a State's administrative remedy meets federal standards. *Compare* 110 Stat. 1321-71—1321-73 *with* 42 U.S.C. § 1997e(a)(2) & (b) (1994); *see also Booth*, 121 S.Ct. at 1825 n. 5. Finally, it requires that a prisoner exhaust "available" administrative remedies, regardless of whether

[5] During the debate on PLRA, the National Association of Attorneys General estimated the nationwide costs of defending prisoner section 1983 litigation at $81 million a year. *Criminal Oversight*, Wall St. J., June 10, 1996, at A18. On the other side of the equation, a very low percentage of prisoner section 1983 suits "result in outcomes favorable to plaintiff[s]." *Hart & Wechsler* at 1122 n.6 (noting that in one federal district court, prisoners prevailed in "fewer than 0.5%" of the cases filed) (citation omitted).

the remedy is "effective," 42 U.S.C. § 1997e(a)(1) (1994), or offers the relief sought. *Booth v. Churner*, 121 S.Ct. at 1825.[6]

B. The Court Of Appeals Erred In Holding That Respondent's Excessive Force Claim Is Exempt From The PLRA's Exhaustion Requirement

The court of appeals erred in holding that respondent Nussle's excessive force claim is not subject to PLRA's exhaustion requirement. It reasoned that while Section 803(d) "added teeth to the § 1997e(a) exhaustion provision," Pet. App. 5a, it "simultaneously" and "explicitly limited its applicability only to federal *actions that are brought 'with respect to prison conditions.'*" *Id.* at 6a (quoting 110 Stat. 1321-71) (emphasis added). While correctly observing that Section 803(d) does not define this pivotal language, *see id.* at 9a, the court of appeals dismissed the definition that Congress gave the same term, just one page earlier in the Statutes at Large, *see* 110 Stat. 1321-70, as "awkward," "elephantine" and "roundabout phraseology." Pet. App. 11a-12a.

The court of appeals thus held that Nussle's lawsuit is not an "action . . . with respect to prison conditions" because it arises out of a "'single or momentary matter' . . . that [is] directed at [a] particular individual[]." Pet. App. 9a (quoting *Booth v. Churner*, 206 F.3d at 300-01 (Noonan, J., concurring

[6] PLRA's provisions have had a substantial impact on the number of prisoner section 1983 suits. In fiscal year 2000, the federal courts experienced a "38 percent drop in state prisoner petitions involving civil rights" from fiscal year 1996 levels. *See* Administrative Office of the U.S. Courts, *Judicial Business 2000* 21 (2001) (available at http://www.uscourts.gov/judbus2000/front/2000artext.pdf). While part of the drop is likely attributable to the new filing fee requirements, *see* PLRA § 804, 110 Stat. 1321-73—1321-75 (codified at 28 U.S.C. § 1915), the PLRA's exhaustion requirement undoubtedly played a substantial role.

and dissenting).[7] In so holding, the court disregarded settled principles of statutory construction and ignored this Court's analysis in *McCarthy v. Bronson*, 500 U.S. 136 (1991), which interpreted similar statutory language as applying to a single episode of allegedly unconstitutional conduct.[8] Its holding likewise frustrates PLRA's purpose of reducing the volume of prisoner litigation. The judgment of the court of appeals should accordingly be reversed.

As just noted, section 803(d) does not define the term "action . . . with respect to prison conditions." *See* 110 Stat. 1321-71—73. This language is, however, defined on the preceding page of the Statutes at Large. *See* PLRA § 802(g)(2), 110 Stat. 1321-70 (1996). Section 802(g)(2) states that the term "'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the *effects of actions by government officials on the lives of persons confined in prison*, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* (emphasis added).

The court of appeals declined to apply the italicized language to respondent's excessive force claim for several reasons. First, it reasoned that "[t]his definition, by its own terms, only applies to 'this section,' *i.e.*, 18 U.S.C. § 3626." *Id.* at 9a. Sub-section 802(g), however, contains no such

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[7] The court of appeals also apparently overlooked the district court's finding that Nussle also "alleged that the defendants made him the target of a prolonged and sustained pattern of intimidation." Pet. App. 24a (citing Compl. ¶¶ 7, 9).

[8] The court of appeals cursorily cited *McCarthy v. Bronson*, *see* Pet. App. 12a, but at no point addressed *McCarthy*'s legal analysis. This failure is all the more remarkable given the fact that other courts of appeals, including opinions cited by the court below, relied heavily on *McCarthy v. Bronson* to support their holdings that the exhaustion requirement applies to excessive force claims. *See Booth v. Churner*, 206 F.3d at 295; *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

limitation. *See* 110 Stat. 1321-69. Rather, sub-section 802(g) states: "Definitions.-As used in this section-," *id.*, and then lists the definitions Congress thought necessary for the courts to interpret Section 802. *See id.* at 1321-70. This language does not suggest that the definitions of terms provided therein apply only to section 802.

Second, the court believed it could disregard the definition set forth in § 802(g) because it is, in the court's view, drafted in "awkward language" and "roundabout phraseology" when applied to an excessive force claim. Pet. App. 11a-12a. In so reasoning, the court disregarded the settled rule of construction that "[p]resumptively, identical words used in different parts of the same act are intended to have the same meaning." *United States Nat'l Bank of Or. v. Independent Ins. Agents*, 508 U.S. 439, 460 (1993) (citations and internal quotations omitted). While this presumption can be rebutted, *see id.*, Congress' asserted "awkwardness" in drafting is not a sufficient basis for a court to disregard this canon of construction. Moreover, the court of appeals' view that construing the phrase "effects of actions by government officials on the lives of persons confined" to include an excessive force claim would be "'a circumlocution'" that "'no one on earth, educated or uneducated, would use,'" *id.* at 11a-12a (quoting *Booth*, 206 F.3d at 302 (Noonan, J., dissenting)), is a gross exaggeration.

Contrary to the holding of the court below, every other court of appeals to consider this question has held that the PLRA exhaustion requirement applies to excessive force claims. *See Booth*, 206 F.3d at 296 n.5; *Freeman*, 196 F.3d at 643-44; *Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997). If a guard uses excessive force to quell a prison riot and causes physical injury, *see, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 316-18 (1986), no circumlocution occurs if the injury is described as "the effect[] of action[] by government officials on the lives of persons confined in prison." *See* 110

Stat. 1321-70. As the Third Circuit explained in *Booth*, whether a government official's action involves a "decision not to make basic repairs in the prison, or intentionally to deny a prisoner food, heating or medical attention[,] [a]ll of these actions affect the lives of prisoners similarly: They make their lives worse." 206 F.3d at 295. In short, the manner in which Congress defined the scope of actions subject to Section 803's exhaustion rule "'does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

The court of appeals further reasoned that the term "government officials" in Section 802(g)(2) "is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers . . . who have day-to-day contact with inmates but no administrative or policymaking authority." Pet. App. 13a. According to the court, "even to the extent that we may rely upon [Section 802(g)(2)], it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as 'government officials,' since such a reading of the term 'officials' would include just about any government employee without regard to level of responsibility or authority." *Id.* at 15a. This analysis is untenable for several reasons.

First, Congress did not define the term "government officials" in the PLRA so as to limit it to those officials with "policymaking authority." *See* 110 Stat. 1321-70. It is clear that Congress knows how to use statutory language that is clearly limited to high level officials with such authority. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 464-67 (1991) (discussing ADEA's exclusion from coverage for "an appointee on the policymaking level") (citing 29 U.S.C. § 630(f)).

Second, "lower level government employees, such as corrections officers," Pet. App. 15a, have routinely been referred to as "officials" by this Court. *See McCarthy v. Bronson,* 500 U.S. at 138 ("petitioner brought suit against various prison officials alleging that, in violation of his constitutional rights, they used excessive force when they transferred him from one cell to another"). *See also Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (stating, in suit against corrections officers, that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley*"); *id.* at 9 ("[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated"). Corrections officers have likewise been held to be government "officials" entitled to the qualified immunity accorded executive branch officials in Section 1983 suits. *See Procunier v. Navarette*, 434 U.S. 555, 556 & n.2, 560-63 (1978).

Third, construing the applicable provisions of the PLRA to require exhaustion only if the government official taking the action has policymaking or administrative authority would lead to perverse results that are contrary to one of the PLRA's fundamental purposes. It would foster substantial litigation over such issues as whether the prison official in question (for example, a prison doctor) has sufficient authority to be a "policymaker." *See, e.g., Parratt*, 451 U.S. 530 (suit against Hobby Manager); *Procunier*, 434 U.S. at 556 n.2. (suit against "correctional counselors" and "member of the prison staff in charge of handling incoming and outgoing mail"); *Hudson*, 503 U.S. at 4 (suit against supervisory corrections officer).

The court of appeals' reasoning would also require litigation to decide whether a case can proceed when a prisoner simultaneously sues corrections officers and higher-level prison officials, *see Procunier*, 434 U.S. at 556 (inmate

suit against correctional counselors also named as defendants director of state department of corrections, warden, and assistant warden), or, as here, files a complaint that challenges both ongoing conditions and an incident of excessive force. *See* Pet. App. 24a (opinion of district court) (Nussle "alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation") (citing Compl. ¶¶ 7, 9).

Moreover, precisely because corrections officers "have day-to-day contact with inmates," Pet. App. 13a, their decisions are highly likely to prompt inmate lawsuits, even when "senior policymaking or administrative officials," *id.* at 14a-15a, are not involved. It is just such decisions made by what the court of appeals called "lower level" employees involving a "'single or momentary matter[] . . . directed at [a] particular individual[]," *id.* at 9a, 13a, which are a font of inmate grievances that, absent exhaustion, will ordinarily result in lawsuits.

There is likewise no merit to the court of appeals' suggestion that Congress' concern with "frivolous suits," *id.* at 15a, "refers to subject matter, rather than to the factual merits of a claim, that if proven, would be meritorious." *Id.* at 16a. The statutory text does not support the court's view that there are classes of claims that are "frivolous" as a matter of law, while other classes of claims are not, and that only the former are subject to the exhaustion requirement. *See* § 803(d), 110 Stat. at 1321-71; *see also* § 802(g)(2), 110 Stat. at 1321-70.

Indeed, over the years, a number of "actions . . . with respect to prison conditions," section 803(d), 110 Stat. at 1321-71, have proved meritorious. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978). Yet Congress directed that all inmate grievances are subject to administrative exhaustion. Even if a class of "meritorious" claims could somehow be identified—a highly dubious proposition—there is no plausible reason

why Congress would exempt from the exhaustion requirement those claims, when they may well be resolved most expeditiously by an administrative proceeding rather than litigation. *See Parratt*, 451 U.S. at 529 (inmate suit over lost hobby materials valued at $ 23.50); *cf. Booth v. Churner*, 121 S.Ct. at 1823.

Finally, contrary to the holding and reasoning of the court of appeals, there are numerous instances in which inmates—even those asserting excessive force claims—will be better off if they first use available administrative remedies rather than immediately resort to litigation. As the Judicial Conference recognized, for example, some inmate grievances involve "legitimate claims of assaults or medical needs that should be addressed immediately" through the administrative process. Judicial Conference, *Long Range Plan*, at 64. Subjecting these claims to the inevitable delays inherent in litigation does not serve the interests of prisoners.

Moreover, as a leading inmate litigation handbook explains, "there are some advantages to exhausting [administrative] remedies even if you are not required to do so." John Boston & Daniel Manville, *Prisoner's Self-Help Litigation Manual* 451 (3d ed. 1995).[9] And in those cases in which a

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[9] The *Prisoner's Self-Help Litigation Manual* explains the advantages of exhaustion to prisoner litigants as follows:

> (a) *Exhausting remedies may save you a lot of argument about whether you have to exhaust them.* The time you save by going directly to court may be lost if the defendants file a motion to stay or dismiss your case because you have not exhausted. Even if they are completely wrong and you win, it may take the court a long time to get around to deciding the issue. If you exhaust first, that is one less issue in the way of getting a decision on the merits.
>
> (b) *You might win the grievance.* Even a bad grievance system sometimes makes the right decision, and it is usually a lot easier and faster to get a grievance decision than to prosecute a lawsuit.

grievance is not resolved to the inmate's satisfaction through the administrative process, the PLRA expressly contemplates that litigation can follow.

As the foregoing demonstrates, the court of appeals' creation of an "excessive force" exception to PLRA's exhaustion rule is legally erroneous and counterproductive. The holding of the court below defeats one of the fundamental purposes of the PLRA and, as just noted, will often disadvantage inmates as well. It will without question lead to extensive case-by-case litigation over the elusive question of whether a prisoner's claim involves "'circumstances affecting everyone in the area affected by them,'" and is thus a prison condition subject to section 803(d), or whether it involves " 'single or momentary matter[s]' . . . that are directed at particular individuals" and therefore, in the court of appeals' view, not subject to exhaustion. Pet. App. 9a (citation omitted).

Yet as this Court has recognized, "the distinction between cases challenging ongoing conditions and those challenging

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(c) *You may look better in court.* Some judges believe that many prisoner claims do not really belong in court and that some prisoners use the courts to annoy and disrupt. You may get a more sympathetic reception, and even be viewed as more credible, if you can show that you tried to work out your problem through the established prison channels.

(d) *Even if your grievance is denied, you may obtain information or statements that will help in your lawsuit.* Prison officials may be more honest in responding to a grievance than to a lawsuit because they may not have lawyers telling them what not to say. They might admit, for example, that they have adopted a certain rule to save money. This admission could be very helpful to you if they later claimed in court that they did it for security reasons. You should think very seriously about the advantages of getting their position down on paper before you go to court.

Boston & Manville, *Prisoner's Self-Help Litigation Manual* at 451.

specific acts of alleged misconduct will often be difficult to identify." *McCarthy v. Bronson*, 500 U.S. at 143. In response to a similar argument made in an Eighth Amendment case a decade ago, the Court reasoned:

> The concurrence would distinguish these cases on the ground that they did not involve "conditions of confinement" but rather "specific acts or omissions directed at individual prisoners." It seems to us, however, that if an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else. Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners, but we see no basis whatever for saying that the one is a "condition of confinement" and the other is not . . . .

Wilson v. Seiter, 501 U.S. 294, 299 n.1 (1991) (citation omitted). *Cf. id.* at 303 ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

In *McCarthy v. Bronson*, a case virtually on all fours with this one, the Court unanimously ruled that the statutory term "conditions of confinement" in the statute governing the jurisdiction of U.S. magistrates encompasses an excessive force claim. In *McCarthy* the question presented was whether 28 U.S.C. § 636(b)(1)(B), which "authorized the nonconsensual referral to magistrates for a hearing . . . 'of prisoner petitioners *challenging conditions of confinement*,'" applied to "cases alleging a specific episode of unconstitutional conduct" such as the use of excessive force by prison officials. 500 U.S. at 137-38 (quoting 28 U.S.C. § 636(b)(1)(B)) (emphasis added).

The *McCarthy* Court noted that § 636(b)(1)(B) had been enacted only three years after *Preiser v. Rodriguez* had described several cases involving "challenges to specific instances of unconstitutional conduct . . . as challenges to 'conditions of confinement.'" 500 U.S. at 142 (quoting *Preiser*, 411 U.S. at 498). Observing that "the language in this Act [§ 636(b)(1)(B)] . . . clearly parallels . . . *Preiser*," a unanimous Court rejected the very argument adopted by the decision below—that "Congress used the term 'conditions of confinement' to mean ongoing situations." *Id.* (footnote omitted). The Court reasoned that using "the definition of 'conditions of confinement' that we had used in *Preiser* is consistent" with the Act's purpose of "authoriz[ing] greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload.'" *Id.* at 142-43 (citation omitted). The Court also explained that its holding "furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of petitioner's suggested exception for single episode cases." *Id.* at 143.

The term "prison conditions" in PLRA § 803(d) "clearly parallels" the term "conditions of confinement" used in § 636(b)(1) and analyzed in *McCarthy*. *See* 500 U.S. at 142. Just as § 636(b)(1) embraces both "single episode cases" and "specific instances of unconstitutional conduct," 500 U.S. at 142-43, so does the language of the PLRA. Congress enacted the PLRA only five years after the *McCarthy* Court unanimously construed the language of § 636(b)(1)(B) to apply to cases "challenging specific acts of alleged misconduct" such as the excessive force claim at issue in that case. *See* 500 U.S. at 143. Congress had no reason to expect courts to construe the term "prison conditions" in the PLRA any differently.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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